



State of New Hampshire  
DEPARTMENT OF ENVIRONMENTAL SERVICES  
WASTE MANAGEMENT COUNCIL

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STATE OF NEW HAMPSHIRE  
WASTE MANAGEMENT COUNCIL

**Decision & Order**

*Rehearing of Motion to Dismiss*

**Docket No. 03-05 WMC**

Appeal of Town of Bethlehem, NH  
In re: Permit No. DES-SW-SP-03-002

**Background**

On April 14, 2003, Attorney Brenda E. Keith filed a petition for appeal of DES Permit No. DES-SW-SP-03-002 ("the permit") on behalf of the Town of Bethlehem, NH ("the Appellant") with the NH Waste Management Council ("the Council"). The petition asserted that the Department of Environmental Services, Waste Management Division ("DES") failed to consider the Appellant's position against further expansion of the landfill in contravention of RSA 149-M:11(IV). The petition asserted that DES erred by issuing the permit to the applicant, North Country Environmental Services ("NCES"), because the application did not meet the requirements of RSA 149-M:11. The petition asserted that DES erred interpreting RSA 149-M:11(V)(c) and (d) to include only those landfills that had valid standard permits. The petition asserted that DES erred in issuing the permit because the facility did not assist the state in achieving the implementation of hierarchy and goals under RSA 149-M:2 and M:3, as required under RSA 149-M:11(III)(b). The petition asserts that DES erred by not requiring NCES to correct an incomplete application. The petition asserted that DES erred by refusing to grant the Appellants request for a second public hearing under RSA 149-M:11(IV).

On April 21, 2003 Attorney Maureen D. Smith filed an appearance with the Council on behalf of DES.

On April 21, 2003 Attorney Brian K. Gould filed an assented-to motion to intervene with the Council on behalf of NCES.

On April 24, 2003 the Council voted to accept the Appellants petition for appeal, and to grant NCES' assented-to motion to intervene.

An appeal hearing was scheduled for May 22, 2003 at 11:00am and the parties to the appeal were notified by written hearing notice.

On May 7, 2003, Attorney Brian K. Gould filed a motion to dismiss appeal on behalf of NCES. In his filing, Attorney Gould argued that most of the Appellants petition for appeal and supporting memorandum of law was devoted to its assertion that DES failed to properly apply RSA 149-M:11 ("the Public Benefit Statute"). Attorney Gould argued that dismissal is proper where the relief sought by the petition for appeal is based upon a misinterpretation of the law. Attorney Gould specifically argued that contrary to the assertions made in the Appellants petition for appeal, DES did consider the Appellants concerns relative to the granting of the permit. In support of this argument, Attorney Gould offered appellants petition for appeal exhibit M, an eleven-page response by DES to oral and written concerns expressed by the town and its citizens which was sent to the town's counsel on the same day that the permit was granted. Attorney Gould argued that contrary to the appellants petition for appeal, DES did fulfill the requirements of RSA 149-M:11. In support of this argument Attorney Gould offered appellants petition for appeal exhibit M, DES' detailed March 7, 2003, Capacity Needs Analysis, calculated precisely in accordance with RSA 149-M:11, V methodology. Attorney Gould further argued that contrary to the Appellants petition for appeal, DES did not misapply RSA 149-M:11, V (c). In support of this argument Attorney Gould again offered appellants exhibit M as proof that DES did not misapply the statute. Attorney Gould argued that DES granted NCES a standard permit for Stage IV on the express condition that NCES "operate this facility in a manner that will assist in achieving the implementation of the hierarchy and goals under RSA 149-M:11, III(b) and shall avoid to the extent possible the disposal of recyclable material in the landfill." In support of this argument Attorney Gould offered appellants petition for appeal exhibit A. Attorney Gould

argued that DES did in fact hold a public hearing on October 8, 2002 before granting the permit, and therefore DES did comply with RSA 149-M:11. IV(a), which requires “at least one public hearing in the host municipality.” Attorney Gould further argued that although the Appellant requested a second public hearing DES was not required to grant that request.

On May 22, 2003, prior to commencement of the scheduled appeal hearing in this matter, the Council convened a motions hearing to allow all parties to the appeal an opportunity to argue their respective positions relative to the May 7, 2003 motion to dismiss appeal. Present at the hearing were Attorneys Keith, Smith, and Gould. All parties were given an unlimited amount of time to argue their position(s). Members of the Council posed various questions to each of the parties. All parties were given an unlimited amount of time to answer Council questions. After carefully considering arguments by all parties the Council concluded by majority vote, that contrary to the assertions made by the Appellant in the petition for appeal, DES did in fact comply with the statutory requirements of RSA 149-M.

On June 12, 2003, the Council issued its Written Decision to grant the NCES motion to dismiss.

In accordance with New Hampshire Code of Administrative Rules Env-WMC 203.29, any person whose rights might be directly affected by a decision of the Council may file with the Council a motion for rehearing within 20 days of the date the written decision is issued.

On July 1, 2003, and in conformance with New Hampshire Code of Administrative Rules Env-WMC 203.29, Attorney Keith filed a motion for rehearing on behalf of the Appellant. Relief requested in the Appellants motion included granting the motion for rehearing, scheduling a hearing where the Appellant can call and cross-examine witnesses and present evidence on all matters raised in its notice [petition] of appeal and allow the Appellant and NCES to file Findings and Rulings pursuant to New Hampshire Code of Administrative Rules Env-WMC 203.23.

On July 7, 2003, Attorney Gould filed an Objection to the Motion for Rehearing.

On July 16, 2003, Attorney Smith filed a response to the motion for rehearing in which she supported the Council's decision to grant the motion to dismiss.

On July 24, 2003, at its regular Council meeting, the Council took up the motion for rehearing. Present at this Council meeting were Attorneys Keith, Smith, and Gould. During the Council's discussions each of the Attorneys were given an opportunity to answer Council questions, as well as to comment on their respective position(s) relative to the motion for rehearing. By a majority vote, the motion for rehearing was partially granted as follows. The Council did not grant relief as requested in the motion for rehearing. The Council did however order a rehearing of the May 22, 2003 motion to dismiss hearing. The rehearing of the motion to dismiss was scheduled to be conducted on August 28, 2003 at or about 10:00am in Room 112 of the offices of the Department of Environmental Services, 6 Hazen Drive, Concord, NH.

#### **Discussion**

On August 28, 2003, the Council convened a rehearing of the motions hearing to allow all parties to the appeal an opportunity to argue their respective positions relative to the May 7, 2003 motion to dismiss appeal. Present at the hearing were Attorneys Keith, Patterson (for Attorney Smith), and Gould. All parties were again given an unlimited amount of time to argue their position(s). Members of the Council posed various questions to each of the parties. All parties were given an unlimited amount of time to answer Council questions. After carefully considering arguments by all parties the Council concluded by majority vote, that contrary to the assertions made by the appellant in the petition for Appeal, DES did in fact comply with the statutory requirements of RSA 149-M. The Appellant did not present a new or compelling argument or offer evidence substantially different than the argument and evidence presented at the original motions hearing on the motion to dismiss.

#### **Order**

The motion to dismiss is hereby **GRANTED**.

Docket No. 03-05 WMC – Town of Bethlehem Appeal  
Decision & Order re: Rehearing of Motion to Dismiss  
September 2, 2003

**Reconsideration**

Pursuant to RSA 541:6, within thirty days after the application for a rehearing is denied, or, if the application is granted, then within thirty days after the decision on such rehearing, the applicant may appeal by petition to the Supreme Court.

So Ordered for the Council by:

A large, bold, black stamp with the word "COPY" in all caps is superimposed over the signature line. The signature is written in black ink over the stamp.

Dated September 2, 2003

Michael Sclafani, Appeals Clerk